Carve-Out As an Answer to the Contribution Question in Private Antitrust Litigation

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CARVE-OUT AS AN ANSWER TO THE CONTRIBUTION QUESTION IN PRIVATE ANTITRUST LITIGATION

One of the most frequently litigated matters in federal antitrust law today is the issue of whether to permit contribution among antitrust defendants in private, treble damage actions. Contribution is the spreading of liability assessed against one defendant among all defendants responsible for the plaintiff's injury. Traditionally, federal common law did not recognize a right of contribution among alleged violators of the antitrust laws.

In 1979, however, the Eighth Circuit


"The vast class action damage exposure from which the [contribution] problem results did not surface until the 1970's after the revision of Rule 23 to permit the modern class action in 1966, and the denial of the pass-on defense in the Hanover Shoe case in 1968." S. REP. No. 428, 96th Cong., 1st Sess. 11 (1979).

2. See Martello v. Hawley, 300 F.2d 721, 723 (D.C. Cir. 1962). See generally Brief for Amicus Curiae at 7, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979) (contribution is mechanism to apportion damages among defendants). See also Restatement (Second) of Torts § 886(A) (1979); Corbett, Apportionment of Damages and Contribution Among Co-Conspirators in Antitrust Treble Damage Actions, 31 FORDHAM L. REV. 111, 117 (1962) (contribution is division of damages between joint tortfeasors; indemnity is shifting of entire loss on one whose wrong has been primarily responsible for injury sustained); Comment, Contribution Among Joint Tortfeasors, 44 TEX. L. REV. 326 (1965).

3. See Goldlawr, Inc. v. Shubert, 276 F.2d 614 (3d Cir. 1960) (dictum). Goldlawr, however, involved two distinct tortious acts rather than the actions of joint tortfeasors and placed a great deal of emphasis on an admiralty decision that was later modified. See note 29 infra and accompanying text. But see Webster Motor Car Co. v. Zell Motor Car Co., 234 F.2d 616 (4th Cir. 1956) (suggesting that contribution between Sherman Act co-conspirators may be permissible under Maryland law). See generally Union Stockyards Co. v. Chicago, B. & Q.R.R., 196 U.S. 217, 224 (1905) (federal common law will not permit contribution among any type of joint tortfeasors).

Settlements entered into among defendants under current antitrust law are subtracted from

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Court of Appeals in \textit{Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.} reversed a lower court ruling\textsuperscript{4} and granted defendant's motion to implead a third party for contribution purposes.\textsuperscript{5} Courts have disagreed sharply with the Eighth Circuit decision.\textsuperscript{6} The resulting conflict among the circuits,\textsuperscript{7} proposed congressional legislation supporting contribution in price-fixing actions,\textsuperscript{8} and sharp debate on the issue among members of the antitrust bar\textsuperscript{9} has generated a controversy that jeopardizes effective enforcement of the intricate antitrust laws.\textsuperscript{10}


\textsuperscript{5} 594 F.2d 1179 (8th Cir. 1979).


\textsuperscript{8} \textit{See} S. 1468, 96th Cong., 1st Sess. (1979) (advocates contribution except against good faith settling defendants).


This Note proposes that the "carve-out" or "claim reduction" theory satisfies both opponents and proponents of antitrust contribution. Carve-out suggests that nonsettling defendants should be credited for a settling defendant's settlement with plaintiff. The first section of this Note traces the evolution of contribution in the antitrust context. The second section presents recent cases that have dealt with the antitrust contribution issue. The third section lays the ground rules for a proper resolution of the contribution question. This Note then sets forth the pragmatic, policy, and constitutional arguments raised in the antitrust contribution debate. The final section of the Note enunciates a carve-out theory that will provide the courts with an efficient and equitable solution to the contribution question in antitrust litigation.

I. DEVELOPMENT OF A CONTRIBUTION THEORY

A violation of the antitrust laws is tortious conduct and results in the imposition of joint and several liability on the antitrust tortfeasors. In private actions, plaintiffs may seek relief from any or all of the joint tortfeasors. Antitrust violators generally manifest some degree of illegal intention during the commission of their wrongful

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acts. The common-law rule denying contribution among intentional tortfeasors gained wide acceptance in the antitrust laws. Federal courts, bound to adhere to federal common law in antitrust actions,
historically refrained from conducting a serious evaluation of the strict common-law prohibition against contribution. In 1960, however, the Third Circuit Court of Appeals in dictum expressly rejected the notion that antitrust defendants could seek contribution from fellow wrongdoers.

State courts and legislatures vigorously attacked the common-law rule, which denied contribution among negligent tortfeasors, prior to the Professional Beauty decision. The courts in Knell v. Felt-


20. A number of litigants, arguing for recognition of a right of contribution in antitrust actions, have asserted that federal common law should not bind courts on the contribution issue but should attempt instead to decipher the goals and purposes of the federal antitrust laws. See Brief for Appellant at 7, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189 (8th Cir. 1979) (Hanson, J., dissenting).

The task of interpreting Congress' intent on contribution when it drafted the Sherman Act in 1890 would be an arduous one. See Corbett, supra note 12, at 136-37 (inspection of both goals and purposes of antitrust laws and other areas of federal common law that have adopted contribution is the appropriate means to resolve antitrust contribution questions).


man,23 Kahr v. Allegheny Airlines, Inc.,24 and Gomes v. Brodhurst25 indicated that the federal judiciary recognized the state law trend toward allowing contribution among negligent, nonantitrust tortfeasors.26 Dissatisfaction with the no contribution rule first arose, however, in the federal common law of admiralty.27 Although the United States Supreme Court initially denied a right of contribution for admiralty claims in Halcyon Lines v. Haem Ship Ceiling & Refitting Corp.,28 the Court subsequently narrowed the holding in Halcyon Lines29 and permitted contribution in a number of admiralty actions.30

Congress further eroded the contribution prohibition by statutorily

Several Liability, 25 Calif. L. Rev. 413, 426-29 (1937); Comment, Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases, 68 Yale L.J. 964, 981-84 (1959); Uniform Contribution Among Tortfeasors Act (1977).

The tort law trend among the states to adopt a comparative negligence rule, as opposed to a contributory negligence rule, is a harbinger of the trend to permit contribution among tortfeasors. See W. Prosser, supra note 17, at 433.


24. 504 F.2d 400 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975) (contribution granted in aviation disaster litigation).

25. 394 F.2d 465 (3d Cir. 1968) (nonsettling defendants received contribution from settling defendants on a comparative fault measure rather than by a proportional amount of settlement). “There is no longer a legitimate place in our system . . . for a rule of law which places the full burden of restitution upon one who is only in part responsible for plaintiff's loss.” Id. at 467.

26. See W. Prosser, supra note 17, at 306-08. “There is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the . . . plaintiff's . . . whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.” Id. at 307 (emphasis added); Restatement of Restitution § 88 (1937); Restatement (Second) of Torts § 886(A) (1979) (allowing contribution only for such intentional wrongs as defamation and misrepresentation); Uniform Contribution Among Tortfeasors Act § 1C (1955). See generally Note, Toward a Workable Rule of Contribution in the Federal Courts, 65 Colum. L. Rev. 123 (1965).


28. 342 U.S. 282 (1952) (no right of contribution through third party action for negligence in an admiralty action in absence of specific legislation).


30. See note 27 supra. See also Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1183 (8th Cir. 1979). “As (sic) a minimum Cooper Stevedoring and earlier admiralty cases demonstrate that under certain circumstances, the Supreme Court is willing to fashion a rule allowing contribution without express direction from Congress.” Id.
promoting contribution in suits brought under the Federal Employers Liability Act, the Federal Tort Claims Act and the Civil Rights Act of 1964. The federal courts have generally permitted contribution in suits filed under these acts. Congressional amendments to the Securities Act of 1933 and the Securities and Exchange Act of 1934 continued the trend toward abrogation of the no contribution rule in negligence actions by allowing contribution for intentional abridgments of the securities acts. Federal courts not only carried out the expressed legislative intent of these amendments to the Securities Act, but also allowed contribution in securities cases in which Congress had not expressly authorized contribution.


The United States Supreme Court granted certiorari during the 1979 term to review the contribution issue in the Corrugated Container antitrust litigation and also in the Title VII context in Glus v. C.G. Murphy Co., 562 F.2d 880 (3d Cir. 1977). See generally 104 LAB. REL. REP. (BNA), no. 21, p. 41, July 14, 1980. Recently, however, the Court dismissed certiorari in the Corrugated Container litigation. 49 U.S.L.W. 3288 (U.S. Oct. 20, 1980) (No. 79-972).


38. The courts utilize an in pari materia approach to allow contribution under specific sections of the securities acts that do not expressly provide a right of contribution. See Madigan, Inc. v. Goodman, 498 F.2d 233, 237-38 (7th Cir. 1974); Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), aff'd, 442 F.2d 1346 (2d Cir.) (per curiam), cert. denied, 404 U.S. 941.
II. RECENT DEVELOPMENTS IN ANTITRUST LAW

In the late 1960's the Third Circuit's dictum in *Goldlawr v. Shubert*\(^{39}\) and a Sixth Circuit opinion\(^{40}\) constituted the entirety of federal court decisions even tangentially related to contribution under the antitrust laws. In 1969 a federal court finally confronted the contribution issue in an antitrust context. In *Sabre Shipping Corp. v. American President Lines, Ltd.*\(^{41}\) a district court held that nonsettling defendants in an antitrust action could not implead settling defendants for contribution purposes.\(^{42}\) The *Sabre Shipping* court relied heavily on the Supreme Court's opinion in the *Halcyon Lines* admiralty case,\(^{43}\) believing that the Supreme Court's blanket rejection of contribution in admiralty actions mandated an equivalent denial of a right to contribution under the federal antitrust laws. The Supreme Court's subsequent narrowing of the *Halcyon Lines* decision severely undercuts the significance of *Sabre Shipping* in evaluating the propriety of contribution in antitrust actions.\(^{44}\)

The Eighth Circuit's divided opinion in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*\(^{45}\) represents not only a significant departure from limited antitrust precedent prohibiting contribution,\(^{46}\)
but also a potentially drastic alteration of the practice of antitrust law.\textsuperscript{47} Plaintiff, Professional Beauty, alleged that National Beauty violated section 2 of the Sherman Act\textsuperscript{48} by conspiring with La Maur, a manufacturer of beauty supplies, to terminate Professional Beauty’s distributorship.\textsuperscript{49} Professional Beauty, however, did not name La Maur a defendant in the action.\textsuperscript{50} In the initial stages of discovery, the district court denied National Beauty’s motion to implead La Maur as a third party defendant.\textsuperscript{51} On appeal, the Eighth Circuit reversed this ruling and granted a right to contribution on a per capita\textsuperscript{52} basis in the event that the lower court found a section 2 violation.\textsuperscript{53} The court of appeals asserted that fairness under the particular circumstances\textsuperscript{54} should per-

\textsuperscript{47} See Gomes v. Brodhurst, 394 F.2d 465, 468 (3d Cir. 1968); Voluntary settlements are to be encouraged and a rule permitting contribution under such circumstances would not work to that end. Not only would a joint tortfeasor be stripped of any incentive to settle but he would have a positive incentive to stand trial and actively participate in his defense in order to minimize his liability.


\textsuperscript{49} See Brief for Appellant at 5, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979).

\textsuperscript{50} Id. at 7 (Plaintiff did not file a claim against La Maur because “it was a business decision [that] they [Professional Beauty] made due to the fact that they were getting their line [of beauty supplies] back”). See notes 68, 90 infra.


\textsuperscript{52} The Eighth Circuit equated the term “per capita” with “pro rata”; i.e., if the district court had uncovered a section 2 violation, La Maur and National Beauty would be responsible for one-half of the judgment. 594 F.2d 1179, 1182 n.4 (8th Cir. 1979). On remand to the district court, defendants La Maur and National Beauty entered into “nominal” settlements with plaintiff. (Telephone conversation with Charles A. Mays, Attorney for La Maur, October 29, 1980).


\textsuperscript{54} See 594 F.2d 1179 (8th Cir. 1979).

The deciding factor in our decision is fairness between the parties. We conclude that fairness requires that the right of contribution exist among joint tortfeasors at least under certain circumstances. There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff’s whim or spite, or his collusion with the other wrongdoer.

\textsuperscript{Id. at 1185, 1186 (emphasis added). The Professional Beauty court felt that the contribution question should be resolved on a case-by-case method with particular attention paid to the Supreme Court’s four factor test in Perma Life Mufflers Co. v. International Parts, Inc., 392 U.S. 134, 146-47 (1968) (White, J., concurring). The four factors are: (1) which party is relatively responsible for originating and implementing the scheme; (2) which party was reasonably expected to benefit from the plan; (3) did one of the parties attempt to terminate its participation in the illegal plan; and (4) which party ultimately profited or suffered from the arrangement. 594 F.2d at 1186. But see Proposed Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Committee of the Judiciary, 96th Cong., 1st Sess.
mit National Beauty to introduce evidence regarding La Maur's involvement in the conspiracy.\textsuperscript{55} This ruling must be qualified to reflect that plaintiffs and named defendants had not executed a settlement agreement.\textsuperscript{56} Furthermore, one of only three possible litigants filed a motion to implead in a timely manner. A tardy motion in a multiparty action did not confront the *Professional Beauty* court.

In the aftermath of *Professional Beauty*, defendants in other antitrust cases attempted to implead third party defendants or assert cross-claims against defendants who had previously negotiated settlement pacts with plaintiffs.\textsuperscript{57} In *In re Ampicillin Antitrust Litigation*\textsuperscript{58} one nonsettling defendant, relying on *Professional Beauty*, filed a motion for leave to amend its answer and to assert cross-claims

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\item \textsuperscript{55} See Brief for Appellant at 29, *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979).
\item \textsuperscript{56} See 594 F.2d at 1184 (The "problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case"); Alabama v. Blue Bird Body Co., No. 75-23-N, slip op. at 3 (M.D. Ala. May 18, 1979) (failure of *Professional Beauty* decision to deal with settling defendants is "Achilles heel" of that case).
\item \textsuperscript{57} In the wake of *Professional Beauty*, nonsettling defendants in *In re Eastern Sugar Antitrust Litigation*, J.P.M.D.L. 201A (E.D. Pa. April 2, 1979), sought to gain a right of contribution from settling defendants after four years of litigation on the main claim, ninety days before trial, and immediately before the opt-out date for a number of settling defendants. The court denied defendant's motion for leave to amend its answers and join additional parties. The Middle District of Alabama in Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. May 18, 1979) dismissed nonsettling defendant's motion to assert cross-claims for contribution against settling defendants on May 18, 1979. The *Blue Bird Body* court held that contribution cannot be permitted if all potential antitrust violators are parties to the action and the settling defendants have "paid for their wrongs" by compensating the plaintiffs.
\item The Eastern District of Pennsylvania again confronted the contribution question in *Hedges Enterprises v. Continental Group, Inc.*, [1979-1] Trade Cas. (CCH) ¶ 62,717 (E.D. Pa.) (*Consumer Bag Antitrust Litigation*). The *Consumer Bag* action dealt exclusively with a section 1 price-fixing charge rather than the section 1 and 2 allegations present in *In re Ampicillin Antitrust Litigation*. A nonsettling defendant filed its motion for leave to amend answers to assert cross-claims for contribution two and one-half years after the litigation commenced, two months after the last of four defendants had settled, and on the eve of the final pretrial settlement conference of the fourth settling defendant. The *Consumer Bag* court reaffirmed the *Eastern Sugar* ruling on almost iden-
for contribution against a defendant whose settlement was pending court approval. Defendant filed the motion nine years after initiation of the original action and three years after one defendant began to negotiate a settlement with plaintiff's class. The district court denied the motion and held that the retroactive effect of granting contribution on settling parties and the added burden and delay imposed on all parties outweighed the possible prejudice to the movants from exposure to full, trebled liability.

The *In re Ampicillin* decision to deny a right of contribution incorporated four factors that did not exist in *Professional Beauty*. First, movants in *In re Ampicillin* were nonsettling defendants whose co-defendants had entered into good faith settlements with the plaintiff's class. Both plaintiffs filed vigorous briefs in opposition to nonsettling defendants' motion to assert cross-claims for contribution. Plaintiffs had no interest in upsetting nearly $7.5 million in settlement agreements. Furthermore, an allowance of contribution would have compelled defendants either to rescind the settlement pacts after discussing their involvement in the conspiracy with plaintiffs or to adhere to the settlements and risk further liability to nonsettling defendants for contribution.

The judge in *In re Fine Paper Antitrust Litigation*, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979), denied a nonsettling defendant both leave to amend its answers to assert cross-claims for claim reduction and a right to file a separate action against settling defendants for contribution. The *Fine Paper* court held that a grant of contribution in a multiparty, price-fixing action would not promote the deterrent objectives of the antitrust laws, "since there is no suggestion that there are putative tortfeasors who are not now parties to the action. Indeed, the settling defendants are not about to escape liability but to the contrary, have already contributed to a fund for the benefit of the plaintiffs."

A federal district court for the Eastern District of Arkansas stated in a letter opinion on October 1, 1979, that "the *Professional Beauty* case makes it clear that in this circuit pro rata contribution may be enforced among joint tortfeasors in an antitrust action." Little Rock School Dist. v. Borden, Inc., [1980-1] Trade Cas. (CCH) ¶ 63,059, at 77,252 (E.D. Ark. 1979) (letter opinion). A review of a proposed settlement agreement triggered the court's statements concerning contribution. The court hinted that the optimal solution to the contribution issue in the antitrust context would be to encourage settlements and release settling defendants from contribution claims. The court also advocated a carve-out of the nonsettling defendant's exposure to liability by an amount of damages attributable to the settling defendants' relative fault. See *Antitrust & Trade Reg. Rep.* (BNA) A-30, no. 937, Nov. 1, 1979.

59. Movant, however, had settled with one class of plaintiffs.
60. 82 F.R.D. 647, 649 (D.D.C. 1979) (court recognized that nonsettling defendant could institute separate action for contribution against settling defendants, but success of separate action or cross-claim would be speculative); *In re Ampicillin Antitrust Litigation*, J.P.M.D.L. 50 (D.C. Cir. Nov. 1, 1979) (appeal of lower court ruling dismissed for lack of finality).
class. The retroactive effect of permitting contribution among the defendants who had entered into settlement arrangements relying on the absence of a contribution rule would have been severe. Second, movants in *In re Ampicillin* sought to assert cross-claims against existing defendants while defendant in *Professional Beauty* sought to impel an unnamed third party. Third, motions filed by the nonsettling defendants in *In re Ampicillin* were not timely; if granted, the motions would have stultified the proceedings. Lastly, plaintiff in *In re Ampicillin* alleged a multiparty fraudulent patent procurement conspiracy, rather than a limited party, section 2 complaint.

The Fifth Circuit in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.* formally created a split among the circuits on the contribution issue. The *Abraham Construction* affirmand of a lower court contribution ruling rested on facts identical to the third party action in *Professional Beauty*. In *Abraham Construction* and *Professional Beauty* a divided panel of justices addressed the contribution question prospectively. The litigants had not entered into settlements; thus, the belatedness of the motion or the effect of the ruling on settling parties was not in controversy. *Abraham Construction*, however, involved an alleged conspiratorial price-fixing scheme as opposed

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61. See 82 F.R.D. at 650 (court should promote rather than hinder settlements in antitrust actions).

62. See Defendant's (Beecham Group) Motion in Opposition to Bristol-Myer's (nonsettling defendant) Leave to Amend Answers to Assert Cross-Claims at 9, *In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647 (D.D.C, 1979) (settling defendant's strategy in settlement negotiations would have been drastically different had nonsettling defendant asserted its motion for contribution in a timely fashion).

63. See 82 F.R.D. at 648 (both plaintiffs and settling defendants would lose benefit of settlement bargain if motion granted).

64. See id. at 651 (allowance of contribution would greatly complicate and delay the proceedings).

65. See id. at 649 ("movant has been lethargic if in nine years it was unable to uncover possible grounds for contribution").


68. Neither the *Abraham Construction* court nor the parties' briefs offered an explanation for plaintiff's failure to name Radcliff Materials, Inc., Jimco, Inc., or OKC Dredging, Inc., to the original action. But see note 50 supra; note 90 infra.


to a dealer termination suit.\textsuperscript{71} 

The \textit{Abraham Construction} court expressly disagreed with the majority opinion in \textit{Professional Beauty} and refused to alter the traditional federal common-law rule against contribution for intentional antitrust tortfeasors, absent an explicit congressional mandate.\textsuperscript{72} A partial dissent in \textit{Abraham Construction} called for a limited contribution rule in cases that involve unintentional violators of the antitrust laws.\textsuperscript{73} 

The Fifth Circuit reiterated its contribution posture in \textit{In re Corrugated Container Antitrust Litigation}.\textsuperscript{74} Several defendants in the \textit{Corrugated Container} litigation, as in \textit{In re Ampicillin}, entered into costly settlements\textsuperscript{75} with plaintiff class in a multiparty section 1 action.\textsuperscript{76} The nonsettling defendants, in a questionable manner, sought to amend

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\textsuperscript{72} See 604 F.2d 897, 905-06 (5th Cir. 1979). See also Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1190 (8th Cir. 1979) (Hanson, J., dissenting).
\textsuperscript{73} See 604 F.2d 897, 908 (5th Cir. 1979) (Morgan, J., dissenting). But see notes 15 and 16 \textit{supra}; notes 127-33 \textit{infra} and accompanying text (questioning the establishment of different contribution rules based on existence or absence of intent).
\textsuperscript{74} 84 F.R.D. 40 (S.D. Tex.), \textit{aff'd}, No. 79-2439 (5th Cir. Oct. 30, 1979) (order affirming lower court denial of nonsettling defendant's motion to file cross-claims for contribution in conspiratorial, price-fixing action).

On September 13, 1980, a district court jury on remand awarded plaintiffs a 350 million dollar pretrebling verdict against the four remaining nonsettling defendants. Three of the defendants settled with plaintiffs after the jury award, thus imposing a 1.5 billion dollar judgment on the lone, remaining nonsettling defendant, Mead Corporation. \textit{See No. 79-2439 (S.D. Tex. Sept. 13, 1980).}

\textsuperscript{75} See \textit{ANTITRUST & TRADE REG. REP. (BNA)} Á-1, no. 919, June 21, 1979. Over twenty defendants, representing approximately 80\% of the corrugated box market, executed the largest group antitrust settlement to date in an amount in excess of $300 million.

Prior to class certification, two defendants had reached relatively inexpensive settlements with the plaintiffs. Between December 1977 and March 1978, plaintiffs extracted settlements from an additional twenty defendants. These settlements were based on market share, \textit{but the settlement price per market share escalated with each new settlement}. Plaintiffs justified this strategy on the basis of the assumed increasing risk of liability faced by defendants who had not yet settled, but who might be liable for damages based on the sales of the settling defendants.

Petition for Rehearing by Weyerhaeuser Co. and Williamette Industries, Inc. at 2, \textit{In re Corrugated Container Antitrust Litigation}, No. 79-2439 (5th Cir. Oct. 30, 1979) (emphasis added). \textit{See also} Brief for Appellees (Menasha Corp. and Stone Container Corp.) at 6, 7, \textit{In re Corrugated Container Antitrust Litigation}, No. 79-2439 (5th Cir. Oct. 30, 1979). "We [appellees] agree that the 'settlement stampede' in this case was brought about by the no-contribution rule; there is no question that [appellees] paid in settlement amounts far exceeding their assessments of plaintiff's claims." \textit{Id.}

\textsuperscript{76} Plaintiffs alleged that 37 named defendants conspired over an 18 year period to fix prices in the corrugated container and sheet industry nationwide in violation of section 1 of the Sherman Act. Sales of corrugated materials are estimated at $4.5 billion annually. Brief for Appellees (Menasha Corp. and Stone Container Corp.) at 6, 7, \textit{In re Corrugated Container Antitrust Litigation}, No. 79-2439 (5th Cir. Oct. 30, 1979).

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their answers to assert cross-claims for contribution against settling defendants.\textsuperscript{77} The deleterious effect of a retroactive rule on pre-existing settlements compelled a unanimous Fifth Circuit\textsuperscript{78} to affirm a lower court ruling and deny the nonsettling defendants' motion to amend their answers.\textsuperscript{79}

The Corrugated Container court rejected a "carve-out" rule as an alternative to contribution because the trial court had not expressly ruled on the "carve-out" issue.\textsuperscript{80} The carve-out theory suggests that plaintiffs' claim against the nonsettling defendants should be reduced, prior to trebling, by a monetary amount computed with reference to the settlement figure.\textsuperscript{81}

\textsuperscript{77} See Transcript of pretrial hearing at 81, In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979) (Singleton, J.) (evidence of bad faith in nonsettling defendant's delay in filing motions to assert cross-claims for contribution). The trial judge stated that "to some extent, I am convinced that the nonsettling defendants participated in joint defense efforts . . . without revealing their plans to seek contribution." \textit{Id.} Mead Corp. filed a separate suit for contribution against settling defendants, rather than seeking contribution through cross-claim. (No. 4-79-245 (D. Minn. July 10, 1979)). Although dismissed, Mead Corp. filed a motion for reconsideration. (No. 879-1436 (S.D. Tex. Jan. 3, 1980)). This motion maintains the vitality of the contribution question in the Corrugated Container litigation despite the Supreme Court's dismissal of the certiori petition, 49 U.S.L.W. 3288 (U.S. Oct. 20, 1980) (No. 79-972).

\textsuperscript{78} Compare In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979) (unanimous) with Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979) (divided panel).

\textsuperscript{79} Compare In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex.), (contribution may be appropriate in some types of antitrust cases that do not involve multiple parties and would not entail a harsh retroactive effect of a ruling in support of contribution), \textit{aff'd per curiam}, No. 79-2439 (5th Cir. Oct. 30, 1979) with Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 907 (Morgan, J., dissenting) (contribution may be appropriate in cases involving unintentional antitrust violations). \textit{See also In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 42} (S.D. Tex. 1979) (although contribution might be possible in some antitrust actions, retroactive effect of allowing contribution in this case precludes granting of the nonsettling defendant's motion), \textit{aff'd per curiam}, No. 79-2439 (5th Cir. Oct. 30, 1979).

Such a rule [of contribution] should not be applied retroactively where the settling litigants have relied on past precedent in reaching agreements unvarying with plaintiffs' class and in undertaking joint defense efforts which may have worked very substantially to their detriment should (sic) those defendants who have not chosen to settle be allowed to use information gained under the guise of mutual aid to bring cross claims now [would seriously damage settling defendants]. \textit{Id.} Furthermore, settling defendants, under the terms of their settlements, cooperated with plaintiffs' class in the plaintiffs' discovery process. For the court to permit settling defendants to return to their role as active participants in the case would prejudice plaintiffs' class. \textit{See generally} notes 61-64 \textit{supra} and accompanying text.

\textsuperscript{80} See In re Corrugated Container Antitrust Litigation, No. 79-2439, slip op. at 2 (5th Cir. Oct. 30, 1979).

\textsuperscript{81} See notes 234-46 \textit{infra} and accompanying text. \textit{See also} Brief for Appellees (Menasha Corp. and Stone Container Corp.) at 13, In re Corrugated Container Antitrust Litigation, No. 79-
The Fifth Circuit again rejected a contribution motion in *In re Beef Industry Antitrust Litigation*. In the *Beef Industry* litigation, a defendant charged with section 1 and 2 violations executed a settlement agreement out of financial necessity. The nonsettling defendants sought to file a motion to amend their answers to assert cross-claims for contribution four days before the final court approval hearing. A unanimous Fifth Circuit reaffirmed its previous no contribution posture with a brief reference to *Abraham Construction*.

The most recent circuit court to consider the issue denied contribution to a singularly named defendant who was assessed the entire liability for a price-fixing scheme. The lone defendant in *Olson Farms v. Safeway Stores, Inc.* (*Olson Farms I*) commanded only eleven percent of the market shared by other potential conspirators. Plaintiff in the main claim, Cackling Acres, Inc., nevertheless chose to file suit against Olson Farms rather than a potential group of more than twenty alleged co-conspirators. The lone defendant sought contribution in a sepa-
rate action, rather than through a cross-claim, against four principal co-conspirators after the court in the main claim rendered a judgment in excess of two million dollars.\textsuperscript{91} The District Court of Utah denied a right of contribution to Olson Farms.\textsuperscript{92}

On appeal, the Tenth Circuit reasoned that allowance of contribution in a separate action, despite the limited number of litigants,\textsuperscript{93} would necessitate a complete retrial of the merits of the main claim ten years after the conspiracy arose.\textsuperscript{94} Furthermore, the court concluded that the allowance of contribution would prolong the litigation \textit{ad infinitum} by permitting four defendants named in the second action to seek contribution in subsequent actions from fifteen remaining alleged co-conspirators.\textsuperscript{95} The majority applied the maxim that courts should be unwilling to aid the intentional wrongdoer.\textsuperscript{96} The court stated that Congress, not the courts, should resolve the contribution question.\textsuperscript{97} A partial dissent in \textit{Olson Farms I} found inequitable the idea of holding one co-conspirator, who shared in only eleven percent of the market,\textsuperscript{98} fully liable for a trebled judgment while the remaining nineteen alleged co-conspirators escaped liability.\textsuperscript{99}

egg purchasers as defendants because "suing the other distributors . . . would have disrupted the ongoing business relationships between certain of the plaintiffs and certain of the distributors. . . . We [plaintiffs] were doing business with them [unnamed defendants], and they were taking our eggs. And it's pretty hard [to sue] when you have 1,200 cases [of eggs] on the market to be dropped." See Appellant's Petition for Rehearing at 4, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) \$ 62,995 (10th Cir.). See also Brief for Appellant at 5, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) (plaintiff did not file a claim against La Maur for "business reasons").


93. Olson Farms named four other alleged co-conspirators in addition to Safeway Stores in the separate action.


95. \textit{See id.} at 79,707.

96. [1979-2] Trade Cas. (CCH) \$ 62,995, at 79,701 (10th Cir.).

97. \textit{See id.} at 79,704.

98. \textit{See id.} at 79,707 (Holloway, J., concurring in part and dissenting in part).

A divided panel of the Tenth Circuit again denied contribution between Olson Farms and the same alleged co-conspirators in a second price-fixing action brought by Cackling Acres. Defendant in Olson Farms, Inc. v. Safeway Stores, Inc. (Olson Farms II) sought contribution by cross-claim from named defendants for a settlement agreement executed between Olson Farms and plaintiff.

In Olson Farms II the Tenth Circuit reaffirmed its desire to await congressional action on the contribution issue. The Olson Farms II court also noted that contribution might result in delays and procedural and substantive complications. Finally, the Tenth Circuit in Olson Farms II rejected Olson Farms' attempt to distinguish Olson Farms I on procedural grounds. The court found irrelevant the fact that Olson Farms asserted its claim for contribution in the main action rather than in a separate suit. Justice Holloway reaffirmed his partial dissent in

tortfeasors may be permissible) and In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 41 (S.D. Tex.) (contribution might be allowable in cases that do not involve multiple parties or previously executed settlement agreements), aff'd per curiam, No. 79-2439 (5th Cir. Oct. 30, 1979).


103. In Olson Farms II Olson Farms attempted to assert cross-claims for contribution against three defendants named in Cackling Acres II. Cackling Acres failed again to name Safeway Stores as a defendant in the second action. In Olson Farms II Olson Farms unsuccessfully sought to implead Safeway Stores. The appellant in Olson Farms I filed a separate action for contribution against the defendants unnamed in Cackling Acres I.

104. See Brief for Appellees at 18, Olson Farms, Inc. v. Safeway Stores, Inc., No. 78-1773 (10th Cir. Nov. 8, 1979).

It would be one thing to permit contribution where an antitrust action has been tried to judgment . . . but, it would be quite another thing to permit contribution where, as here, no judgment of liability has ever been rendered, and the action has been dismissed by the only antitrust plaintiffs that Congress has given standing to sue.

Id.

105. See text accompanying note 95 supra.

106. No. 78-1773, slip op. at 4 (10th Cir. Nov. 8, 1979) (Olson Farms II). See also note 97 supra and accompanying text.

107. See No. 78-1773, slip op. at 4 (10th Cir. Nov. 8, 1979) (granting of motion for contribution would greatly complicate adjudication of main claim and would have serious retroactive effect on settlements negotiated between cross-claimants and plaintiffs). See Brief for Appellees at 19, Olson Farms, Inc. v. Safeway Stores, Inc., No. 78-1773 (10th Cir. Nov. 8, 1979) (granting of motion would place heavy burden on the court).

Olson Farms I and advocated the application of a limited contribution rule when equitable circumstances merit its use.

In the event that contribution is allowed under the antitrust laws, courts will need to determine the appropriate method of calculating contribution. The Professional Beauty court granted contribution on a pro rata (per capita) basis. The Gomes court adopted a relative (comparative) fault measure. The relative fault measure demands that each defendant absorb the percentage of the judgment that best approximates its relative fault.

The court in Olson Farms I, in dictum, proposed a comparative benefit analysis. A comparative benefit analysis requires a defendant to accept a share of the judgment that reflects profits received as a result of the violation. Contribution based on a defendant's market share may be an appropriate method in a multiparty, horizontal price-fixing conspiracy because all members of the conspiracy adhere to the same illegal agreement.

III. CONDITIONS OF ANALYSIS

An effective resolution of the contribution question requires acceptance of several fundamental principles. First, certainty of the law plays an integral role in the implementation and enforcement of the antitrust laws. Corporate officials must be certain of the possible adverse con-

109. See note 99 supra and accompanying text.
110. See Olson Farms, Inc. v. Safeway Stores, Inc., No. 78-1773, slip op. at 5 (10th Cir. Nov. 8, 1979) (Holloway, J., concurring in part and dissenting in part).
113. See [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,704 (10th Cir.).
114. See ABA MAJORITY REPORT, supra note 9, at 3; S. REP. No. 428, 96th Cong., 1st Sess. 22 n.7 (1979) (market share method is also easily administered).
115. ABA MAJORITY REPORT, supra note 9, at 9. See Brief for Appelles (Menasha Corp. & Stone Container Corp.) at 6, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th
sequences of a business decision. Members of the antitrust bar must be equally certain of the law to properly counsel their clients. Consequently, a decisive answer to the contribution problem is critical.\textsuperscript{116}

Resolution of the contribution issue also must comport with the purpose of the antitrust laws.\textsuperscript{117} Blind adherence to federal common law will not result in a well reasoned solution.\textsuperscript{118} Alternatively, an analysis based entirely on statutory interpretation would exclude consideration of the realities of antitrust practice, judicial insights to the contribution issue, and equitable concerns.\textsuperscript{119}

The contribution dilemma must be resolved prospectively without the presence of proposed settlements.\textsuperscript{120} The arguments advanced by litigants and courts in cases that have dealt with contribution sought in an untimely motion\textsuperscript{121} or with contribution's effect on pending settlements\textsuperscript{122} should not be dispositive.

The primary concern in antitrust practice is with settlement.\textsuperscript{123} The
settlement alternative provides the injured plaintiff with some measure of recovery without the attendant burdens of a prolonged trial. Additionally, a small corporate defendant may decide that defending against the allegation is financially unfeasible because of the expense of litigation. The issues in need of judicial attention without the settlement alternative would overcome the judiciary and thus impair speedy enforcement of the antitrust laws.

Resolution of the contribution question also may hinge on the type of antitrust infraction. The unintentional violator may be more deserving of contribution than the intentional antitrust tortfeasor. The courts could treat price-fixing co-conspirators differently from participants in an illegal territorial allocation scheme. The small corporate defendant might merit contribution more than a large corporate defendant. The feasibility of a rule that allows contribution under some conditions and not under other circumstances (split-rule), however, has been seriously questioned. The objectives of the antitrust laws would not be furthered by adopting contribution under some sections of the antitrust laws and not under others. A "split-rule" would lessen the desired certainty and deterrent value of a contribution.

in forcing a small company to bear the burden of lengthy and extraordinarily expensive litigation and the risk of bankruptcy." S. REP. NO. 428, 96th Cong., 1st Sess. 38 (1979). Plaintiffs also may require settlements to finance the continuance of litigation.


125. See note 84 supra and accompanying text; Brief for Appellees (Owens-Illinois, Inc.) at 2, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979) (appellees settled "to avoid thereby the trouble and expense of further litigation and the possibility . . . of potential judgment liability for the massive amounts being claimed by plaintiffs").

126. See Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 773 (2d Cir. 1972) (strong judicial preference for settlements in antitrust class action litigation). See also note 47 supra.


129. See S. 1468, 96th Cong., 1st Sess. (1979). See also Nat'l L.J., Nov. 19, 1979, at 23, col. 4 (if contribution agreed upon, its implementation should be carried out gradually, possibly beginning in price-fixing arena). The defendants charged under section 2 in Professional Beauty would not have been granted a right of contribution under S. 1468.


131. See notes 15 and 16 supra.

132. ABA MAJORITY REPORT, supra note 9, at 5, 12.
rule.\textsuperscript{133}

It also has been argued that contribution should be allowed only in cross-claims against parties named as defendants in the action\textsuperscript{134} or, alternatively, in a separate action distinct from the main claim.\textsuperscript{135} The inconclusiveness of either proposal mandates that a bifurcated contribution rule based on procedural variances should not be adopted.\textsuperscript{136}

\section*{IV. PRIMARY ARGUMENTS ADVANCED IN THE CONTRIBUTION DEBATE}

Proponents offer three principle arguments in support of contribution. First, a no contribution rule promotes collusion among plaintiffs and defendants who are skilled at the "settlement game."\textsuperscript{137} Collusion

\textsuperscript{133} See note 115 \textit{supra} and accompanying text. The wrongdoer and defense counsel are often unsure of the exact categorization of the illegal conduct until the trier of fact has labeled the violation a section 1, section 2, or Clayton Act infraction. Thus, the desired certainty and deterrent value under a split contribution rule would be severely diminished.


\textsuperscript{135} See Brief for Appellant at 29, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.). See also note 104 \textit{supra}.


A frequent example of the "settlement game" is the \textit{Corrugated Container} litigation.

The strategy of the plaintiffs was to break the defendants' ranks by offering discounted settlements to a few initially in order to pressure subsequent settlements at a higher price. The plaintiffs were successful, settling with the first defendant at $500,000.00 per percentage point of market share, and the second at $1 million. . . . Since this [settling] defendant was now protected from having to share in paying off that sum [judgment], the liability of the other defendants thus increased for all practical purposes by that [settlement] amount overnight. This dramatic escalation in liability increased the settlement pressure as other defendants—now paying at a rate of $2 million a point and rising—sought to protect themselves. Because the damages attributable to these settling defendants also remained in the case, the damage exposure and settlement price thus continued to increase greatly for nonsettling defendants every time another defendant settled.

The upshot was that Green Bay Packaging, all the while protesting its innocence, was forced into a settlement which was proportionately more expensive than that borne by those who settled out early. More specifically, Green Bay settled at $3.5 million a point for a total of $5.5 million. A small, unindicted family-owned business thus had to pay at a rate three and one-half times greater than a company which pleaded nolo and which had a market share nearly five times larger.

may result in a favorable, early settlement agreement or in plaintiff's failure to name a party as a defendant in the original action. Both types of collusive practices work to the detriment of less culpable, named defendants.

Critics of contribution reply that the Federal Rules of Civil Procedure currently guard against the possibility of collusive settlement agreements by requiring court approval of settlements. Furthermore, evidence of the frequency of collusive activities under the present no contribution rule is extremely sketchy. A contribution rule may actually aggravate the incidence of collusive practices among litigants by compelling defendants to participate in sharing agreements.

The second chief contention of advocates of a contribution rule is that the current state of the law coerces defendants into settlement ar-
The actual risk of a nonsettling defendant's liability increases inversely to the number of nonsettling defendants because fewer defendants are left to share in the judgment. Consequently, a nonsettling defendant may be coerced into negotiating a settlement irrespective of his culpability. Nonsettling defendants face a "Hobson's choice of paying an extortionate settlement or risking a judgment in the billions of dollars if they go to trial." Conversely, opponents of contribution argue that a contribution rule also may coerce defendants into settlement. The adoption of a contribution rule would encourage defendants to enter into "sharing agreements" (joint settlement agreements). Larger, more powerful defendants therefore might exert undue influence on the defendant who maintains innocence and does not wish to enter a "sharing agreement." Under the present no contribution rule, a litigant cannot coerce a defendant to settle because a defendant always possesses an opportunity to force a trial on the merits.

The third fundamental plea of the contribution proponents is that equity and fairness cannot allow one wrongdoer to absorb a trebled judgment for wrongs committed by equally, or perhaps more culpable, parties. A contribution rule would encourage defendants to ex-

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144. See Brief for Appellees (Weyerhaeuser Corp. and Williamette Industries) at 8, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979).
145. Brief for Appellees (Menasha Corp. and Stone Container Corp.) at 4, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979); ABA MAJORITY REPORT, supra note 9, at 4 (small, regional defendants maintaining total innocence coerced to settle).
147. "The experience of parties where such [sharing] agreements have been in effect has been that settlement discussions occur on a more rational basis, with liability logically related to culpability and impact upon the plaintiff, and settlement is thus promoted." ABA MAJORlTY REPORT, supra note 9, at 7. But see id. at 3 ("there are many occasions when sharing agreements cannot be recommended in a client's best interests" and are often impractical to achieve); S. REP. No. 428, 96th Cong., 1st Sess. 2 (1979) (sharing agreements difficult to accommodate in nonconcentrated industries).
148. 1979 Hearings, supra note 54, at 101 (statement of Mr. Harold Kohn).
149. See Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185-86 (8th Cir. 1979); Brief for Appellants at 29, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979); D. DOBBS, LAW OF REMEDIES 705 (1973) (under present no contribution rule, one intentional antitrust violator gets off scot-free and is unjustly enriched at expense of nonsettling defendant).
pose and implead the entire conspiratorial network to disperse the judgments among all members of the conspiracy.\textsuperscript{151} Conversely, opponents contend that courts should deny motions to implead additional defendants for the purpose of contribution. They contend that courts should not aid violators of the antitrust laws by allowing intentional antitrust tortfeasors to seek contribution from fellow wrongdoers.\textsuperscript{152}

The most frequently voiced concern in opposition to contribution is that defendants lose all incentive to negotiate a settlement if faced with continuing liability to nonsettling defendants.\textsuperscript{153} Consequently, a contribution rule would encourage defendants to remain in the action and defend against liability.\textsuperscript{154} Plaintiffs also have expressed a desire to retain the no contribution rule to maximize plaintiff's ability to receive settlements.\textsuperscript{155}

Proponents of contribution refer to the areas of securities and tort litigation to substantiate their claim that contribution will not affect the incidence of settlements.\textsuperscript{156} Instead, a contribution rule might foster a desire among defendants to settle with plaintiffs as one entity.\textsuperscript{157}

\textsuperscript{151.} See Corbett, \textit{supra} note 2, at 116, 141.

\textsuperscript{152.} \textit{See} \textit{RESTATEMENT (SECOND) OF TORTS} § 886(A)(3), comment j (1979) (no man will be permitted to base a cause of action on his own intentional tort); \textit{ANTITRUST & TRADE REG. REP.} (BNA) B-3, no. 917, June 7, 1979 ("violators of the Sherman Act are subject to felony prosecution, and it should be contrary to public policy for federal courts to decide and apportion rights among 'felons' "). \textit{See also} Alabama v. Blue Bird Body Co., No. 75-23-N, slip op. at 4 (M.D. Ala. May 18, 1979) (fairness argument in support of contribution dissipates when all alleged violators are named in action and parties have executed good faith settlements).

\textsuperscript{153.} \textit{See S. Rep. No. 428, 96th Cong., 1st Sess. 19 (1979) (everyone will not "rush to settle" under the proposed S. 1468). \textit{See also} Brief for Appellees at 21 n.12, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.) ("[appellant's] bald assertion . . . that settlements would not be impaired [by a contribution rule] defies common sense").


\textsuperscript{155.} \textit{See Alabama v. Blue Bird Body Co., No. 75-23-N, slip op. at 5 (M.D. Ala. May 18, 1979) ("In antitrust actions where the litigation is almost certain to be complicated, expensive and lengthy, encouraging such settlements puts the plaintiff in a much better position to recover damages against at least some defendants and thereby finance continued litigation against the remaining defendants").

\textsuperscript{156.} \textit{See Nat'l L.J., Nov. 19, 1979, at 23, col. 3.}

\textsuperscript{157.} \textit{See note} 143 \textit{supra}, Memorandum for Defendant (Beecham Group) in Opposition to Bristol-Myer's Motion for Leave to Amend Answers to Assert Cross-Claims for Contribution at 9-
V. SECONDARY POLICY ISSUES ADVANCED IN THE CONTRIBUTION DEBATE

Participants in the contribution debate have raised a myriad of policy and constitutional arguments in support of their respective stances. Champions of contribution invariably point to current trends in federal common law to buttress contribution in the antitrust field. On closer examination, most of the trends are inappropriate to the analysis of contribution within the context of the antitrust laws.

Cases that have granted contribution under the Federal Employer's Liability Act apply state law, not federal common law, to justify the allowance of contribution. Actions decided under the Civil Rights Act have summarily allowed contribution without questioning the propriety of a contribution rule. In addition, the burden imposed on the trial process in civil rights actions is minimal in comparison to antitrust contribution.

10. In re Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979) (defendants should be encouraged to settle as group to minimize collusion).

Defendant in In re Fine Paper Antitrust Litigation suggested that a settling defendant might seek indemnification from the plaintiff for any amount that the settling defendant would contribute to the nonsettling defendants. See Memorandum of Westvaco Corp. in Opposition to Motions to Dismiss its Cross-Claims for Contribution at 14, In re Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979). The indemnification approach is an implicit recognition of the carve-out rule. See notes 234-266 infra and accompanying text.

158. See notes 22-26 supra and accompanying text (negligence trend); notes 27-30 supra (admiralty trend); notes 31-34 supra and accompanying text (Federal Employer's Liability Act, Federal Tort Claims Act, Civil Rights Act cases); notes 35-37 supra (securities law cases). See also Restatement (Second) of Torts § 886(A), comment a (1979); Uniform Contribution Among Joint Tortfeasors Act (1977).


161. See note 34 supra.


Cases arising under the Federal Tort Claims Act also have applied state law to justify contribution. The circuit court decisions in *Gomes v. Brodhurst* and *Knell v. Feltman* are often incorrectly cited to substantiate the proposition that the federal judiciary should adopt contribution among antitrust tortfeasors. Both opinions apply local law, not federal common law, to a negligent, rather than intentional, tort action. *Kohr v. Allegheny Airlines, Inc.* is the only opinion in which a federal court enunciated a federal common-law rule of contribution among negligent tortfeasors. The *Kohr* court, however, did not address the allowance of contribution between intentional tortfeasors.

Proponents of contribution frequently refer to the Supreme Court's adoption of a contribution rule in the federal common law of admiralty to support an argument in favor of antitrust contribution. Commentators, however, have uniformly recognized that the law of admiralty is an historical aberration of the federal common law.

The most compelling trend of federal judicial support for contribution among intentional antitrust tortfeasors exists in the securities law area. The allowance of contribution in the highly complex and federally regulated security laws, which also permit a private cause of action, provides a reasonable analogy to the antitrust laws. The rule of *in pari materia* has allowed courts to award contribution under those

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166. *See* note 34 *supra*.
167. 394 F.2d 465 (3d Cir. 1967).
168. 174 F.2d 662 (D.C. Cir. 1949).
169. 394 F.2d 465, 467 (3d Cir. 1967) (application of Virgin Islands law); 174 F.2d 662 (D.C. Cir. 1949) (application of District of Columbia law).
170. *See* note 26 *supra* and accompanying text.
171. 504 F.2d 400 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975).
172. *Id.* (negligent aviation disaster).
173. *See* notes 27-30 *supra* and accompanying text.
sections of the federal securities laws that do not expressly provide for such a right. One might contend, however, that the express statutory allowance of contribution in the securities field suggests that courts should not allow contribution in the antitrust field because Congress has not seen fit to engraft contribution into any section of the Sherman or Clayton Acts.

Critics of contribution forecast that adoption of a contribution rule in the antitrust field will immeasurably complicate an already complicated body of law. Contribution among antitrust violators would encourage defendants to implead additional parties and add tangential issues to the main claim. A contribution rule would force courts to scrutinize the merits of these motions before trial or in a separate action and would detract from rapid adjudication of plaintiff's main claim. The addition of new parties and issues to the main claim would seriously impair plaintiff's right to control the action. The prospect


179. See Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,701 (10th Cir.). See also 1979 Hearings, supra note 54, at 52 (statement of Lowell E. Sachnoff) (contribution in securities cases protects less culpable defendants than it would in antitrust context).

180. See In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 41 (S.D. Tex. 1979). See also notes 10, 64, 107 supra and accompanying text.

One commentator suggested that the majority in Professional Beauty devalued the complexity factor because of their lack of contact with a trial caseload. The dissenting judge in Professional Beauty, Judge Hanson, was a district judge sitting on the panel by designation and was more attuned to the practical pitfalls of allowing contribution in antitrust litigation. See Brown, Contribution Among Joint Tortfeasors, N.Y.L.J., July 10, 1979, at 1, col. 1.

181. Not only would the number of third party defendants increase, but so would the number of intervenors wishing to participate in the defense of the action in the event that liability was established against the named defendants. See Brief for Appellees at 21, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.). See also Corbett, supra note 2, at 137 (defendants "rewarded" for impleading new parties to the action).


of lengthy, multiparty contribution actions would deter private attorneys general from securing enforcement of the antitrust laws.\textsuperscript{184} Advocates of contribution insist that contribution will not render antitrust litigation unmanageable.\textsuperscript{185} They argue that federal courts are equipped with liberal procedural safeguards to oversee complex litigation.\textsuperscript{186} The allowance of contribution in other complex areas of the law\textsuperscript{187} has not paralyzed the adjudication of alleged wrongs.\textsuperscript{188}

Supporters have urged, in refutation of the right of control argument,\textsuperscript{189} that a plaintiff certainly should not object to the addition of other potential wrongdoers to the lawsuit.\textsuperscript{190} Additionally, the prospect

\textsuperscript{184} A contribution rule would deter private plaintiffs from filing suit because of the unwillingness of defendants to engage in settlements. Plaintiffs also desire to avoid long, involved, and costly litigation. \textit{See} note 155 supra and accompanying text.

\textsuperscript{185} \textit{See} Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189-90 (8th Cir. 1979) (Hanson, J., dissenting) (“the net result [of a contribution rule] may be to deter private plaintiffs of relatively limited means from bringing or maintaining a meritless suit”). \textit{See also} Hawai’i v. Standard Oil Co., 405 U.S. 251, 262 (1972); Brief for Appellants at 11, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.) (effective enforcement of antitrust laws requires actions brought by private plaintiffs).

\textsuperscript{186} \textit{See} Brief for Amicus Curiae (Southwest Industries) at 8, \textit{In re Corrugated Container Antitrust Litigation}, No. 79-2439 (5th Cir. Oct. 30, 1979).

\textsuperscript{187} \textit{See} Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 906 (5th Cir. 1979) (Morgan, J., concurring in part and dissenting in part) (“I simply can’t believe that the discretionary nature of the Rule 42(b) provision would discourage an antitrust plaintiff from seeking treble damages should the court recognize a right of contribution”); \textit{Fed. R. Civ. P.} P. 14(a), 42(b). \textit{But see} Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 906 (5th Cir. 1979) (allowance of contribution “may open a Pandora’s box of procedural problems, against which district court discretion may prove a palliation”). \textit{See also} Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184-85 (8th Cir. 1979).

\textsuperscript{188} \textit{See} notes 22-37 supra and accompanying text. \textit{But see ANTITRUST & TRADE REG. REP. (BNA) B-5, no. 917, June 7, 1979} (analogy to state tort law cases is imperfect).

\textsuperscript{189} \textit{See} Rhodes, supra note 9, at 13.

\textsuperscript{190} One commentator has questioned the very existence of the plaintiff’s right to control. \textit{See} Address by Jonathan Rose, American Bar Association Antitrust Section Meeting (Aug. 13, 1979).

\textsuperscript{191} \textit{See} Brief for Appellants at 13, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.) (right of control will be protected by procedural devices); Brief for Appellants at 19, 28, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979) (plaintiff’s burden of proving existence of two party conspiracy will not be heightened by addition of alleged co-conspirators); Memorandum of Westvaco Corp. in Contra to Motions to Dismiss its Cross-Claims for Contribution at 34-38, \textit{In re Fine Paper Antitrust Litigation}, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979) (third party plaintiffs will bear burden of proof of alleged third party defendants’ involvement in conspiracy). \textit{But see} Alabama v. Blue Bird Body Co., No. 75-23-N, slip op. at 4 (M.D. Ala. May 18, 1979) (plaintiff, as injured party, should alone determine who pays damages).
of a defendant's motion for contribution will not discourage a private attorney general from maintaining a suit.\textsuperscript{192} Finally, any slightly injurious effect of a contribution rule on the right of control or the complexity of the litigation should not, in itself, defeat the adoption of contribution.\textsuperscript{193}

Antagonists of contribution assert that a contribution rule would place an intolerable burden on the federal judiciary.\textsuperscript{194} Contribution would permit defendants to toll the antitrust statute of limitations in perpetuity by repeatedly impleading or filing cross-claims against alleged wrongdoers to pressure plaintiffs into releasing their claims.\textsuperscript{195} Opponents argue that precious docket space should not be reserved to litigate stale and dilatory claims between intentional violators of the law.\textsuperscript{196}

Proponents of contribution respond that a solution to the contribution question cannot rest on presumed bad faith abuses of a contribution rule.\textsuperscript{197} Supporters of contribution also suggest that the rule will provide a greater deterrent to potential antitrust violators than the current no contribution rule. Members of the business community will realize that although they are unnamed in the action or have negotiated a favorable settlement, they will be unable to escape some degree of


\textsuperscript{193} \textit{See} United States v. Reliable Transfer, Co., 421 U.S. 397, 408 (1975) ( admiralty action). The Court in that case stated that "[c]ongestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage greedy out-of-court accommodations." \textit{Id.}


\textsuperscript{195} Brief for Appellees at 22, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.); Brief for Appellees at 20, \textit{In re} Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979); \textbf{ABA MAJORITY REPORT}, supra note 9, at 13-15.

\textsuperscript{196} Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,701 (10th Cir.); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 906 (5th Cir. 1979) (Morgan, J., dissenting) (courts should not expend energy on intentional wrongdoers); \textbf{ABA MAJORITY REPORT}, supra note 9, at 3 (suggesting imposition of cut-off date for contribution claims).

\textsuperscript{197} \textit{See} Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), \textit{cert. denied}, 421 U.S. 978 (1975) (massive negligence action allowing contribution without any procedural difficulties).
liability for their anticompetitive conduct.\textsuperscript{198}

Critics of contribution urge that the shared liability concept will not effectively deter wrongdoers.\textsuperscript{199} The threat of a trebled judgment without assistance of contribution should provide a greater deterrent.\textsuperscript{200} In all probability, however, any evidence of the deterrent value of contribution cuts both ways\textsuperscript{201} and should not be a decisive factor in abandoning the current no contribution rule.\textsuperscript{202}

Both sides in the contribution debate insist that the language of the antitrust laws\textsuperscript{203} is consistent with their respective stances.\textsuperscript{204} Advocates of contribution suggest that Congress’ inclusion of “treble damage” remedies and criminal sanctions in the antitrust statutes reflects Congress’ desire to prevent one wrongdoer from absorbing the full measure of damages.\textsuperscript{205} Alternatively, the statutory imposition of “joint and several liability” on antitrust violators indicates a congressional intent to prohibit intentional wrongdoers from enjoying the fruits of contribution.\textsuperscript{206}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{198} See Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979).
\item \textsuperscript{199} See Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130 (1932).
\item \textsuperscript{200} See Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 901 n.8 (5th Cir. 1979) (business managers are risk adverse and deterred more by slight prospect of large loss than strong prospect of small loss); El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. (CCH) \S 61,533, at 72,112 (N.D. Cal. 1976). See also Corbett, supra note 2, at 137 (small company faced with prospect of singular liability especially deterred by no contribution rule).
\item \textsuperscript{201} Deterrence arguments are relevant only if alleged intentional violators have knowledge that contribution will not be available if they are found liable. See Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 901 n.8 (5th Cir. 1979); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189 (8th Cir. 1979) (Hanson, J., dissenting).
\item \textsuperscript{202} See In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40, 42 (S.D. Tex.), aff’d per curiam, No. 79-2439 (5th Cir. Oct. 30, 1979). See also S. Rep. No. 428, 96th Cong., 1st Sess. 18 (1979) (private, treble damage suits serve as greatest deterrent to antitrust wrongdoers).
\item \textsuperscript{203} See notes 20, 117-19 supra and accompanying text.
\item \textsuperscript{204} Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1189 (8th Cir. 1979) (Hanson, J., dissenting) (allegiance to common-law rules cannot be allowed to undermine objectives of antitrust laws). See also El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. (CCH) \S 61,533, at 72,112 (N.D. Cal. 1976).
\item \textsuperscript{205} See Memorandum By Potlach Corp. Concerning the Right of Treble Damage Antitrust Defendants to Contribution and in Support of Motion to Dismiss Claims for Contribution Against Settling Defendants at 17, In re Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979). But see Brief for Appellees at 18-19, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) \S 62,995 (10th Cir.) (no implied right of contribution action under antitrust laws; no congressional intent to aid antitrust co-conspirators; Congress chose treble damage remedy and criminal sanctions in lieu of contribution).
\item \textsuperscript{206} See Brief for Appellee (Radcliff Materials) at 31, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979).
\end{enumerate}
\end{footnotesize}
“treble damages” or “joint and several liability” to the contribution issue may lead to divergent results. For this reason, it is unwise to rely on statutory interpretation to resolve congressional silence on the contribution question.

Defendants in Professional Beauty and Abraham Construction alleged that the courts’ failure to provide a right of contribution abridged their substantive due process and equal protection rights under the Fifth Amendment. The court in Abraham Construction applied a mere rationality test to conclude that a denial of the appellants’ motion to implead for contribution did not infringe on defendants’ substantive due process rights. The Abraham Construction court dismissed appellants’ equal protection claims under a similar rational relation test.

Opponents of contribution rely on the holdings of two notable United States Supreme Court antitrust decisions, Illinois Brick v. Illinois and Perma Life Mufflers v. International Parts Corp., to

207. See note 205 supra and accompanying text. But see 1979 Hearings supra note 54, at 20 (contribution question must be resolved separately from "joint and several liability" terms).

208. See notes 117-19 supra and accompanying text. See generally Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Cort v. Ash, 422 U.S. 66 (1975). Four factors are used to determine whether a private remedy is implicit in a federal statute: (1) Is plaintiff a member of the class that the statute is designed to protect; (2) is there any presence of legislative intent to create or deny the remedy; (3) would such a remedy be consistent with the underlying purposes of the statute; and (4) is the remedy one which is traditionally governed by state law? Id. at 78.


210. See Brief for Appellants at 12, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979) (“[w]ithout contribution among joint tortfeasors there is no equality of protection against all similarly situated; there is no equality in the liabilities imposed on persons under like circumstances; there is no equality in the burden imposed on the one sued”). The Professional Beauty court did not address the due process or equal protection issues.

211. U.S. Const. amend. V.


213. Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 904 (5th Cir. 1979). Appellee (OKC Dredging, Inc.) maintained that the equal protection clause umbrella was not applicable to the contribution debate because all antitrust violators are similarly treated. See Brief for Appellees (OKC Dredging) at 22, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979).


support their position in the contribution debate. Opponents of contribution argue that the indirect nature of the antitrust defendant’s injury should preclude defendant from seeking contribution because the Supreme Court in *Illinois Brick* limited standing in antitrust actions to purchasers directly harmed by defendants’ actions.\(^\text{216}\) Advocates of contribution refer to current legislative revision of *Illinois Brick* to refute any reliance on that decision in resolving the contribution dilemma.\(^\text{217}\)

Litigants have relied on the narrowing of the *in pari delicto* defense in *Perma Life* to support the proposition that equally reprehensible defendants do not deserve a right of contribution.\(^\text{218}\) Those unsympathetic to contribution also have interpreted *Perma Life* to hold that the right to file suit does not hinge on the degree of plaintiff’s culpability. A court, therefore, may assess liability against a defendant irrespective of another party’s fault.\(^\text{219}\)

Defendants also have employed *Perma Life* to support contribution.\(^\text{220}\) Proponents of contribution interpret *Perma Life* to hold that permitting actions between wrongdoers regardless of claimant’s participation in the illegality furthers the objectives of the antitrust laws.\(^\text{221}\)

Congressional reaction to *Illinois Brick* and the plethora of plausible holdings of *Perma Life* do not clarify the contribution issue. The im-

\(^\text{216}\). See Brief for Appellee (Radcliff Materials) at 34, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc. 604 F.2d 897 (5th Cir. 1979). See also Supplemental Memorandum of Appellee (Safeway Stores) at 8, Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir.); ANTITRUST & TRADE REG. REP. (BNA) B-6, no. 917, June 7, 1979 (reluctance of Supreme Court to create new area of antitrust liability with incidental effects on complexity of antitrust litigation without express congressional approval).


\(^\text{218}\). See Brief for Appellee (OKC Dredging) at 19 n.6, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979) (under *Perma Life*, plaintiff is denied recovery when plaintiff and defendant are equally responsible for plaintiff’s injury). See also Brief for Appellee (Radcliff Materials) at 36, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979) (contribution rule would allow supplier-defendant in *Perma Life* to file counterclaim for contribution against dealer-plaintiff).

\(^\text{219}\). See Brief for Appellee at 8, *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979).


impact of *Perma Life* and *Illinois Brick* on the Supreme Court’s future treatment of the contribution issue remains speculative.\(^{222}\)

Many observers of the contribution debate advocate that Congress, and not the courts, should resolve the matter.\(^{223}\) Litigants feel that courts are inadequately equipped to provide a sensible answer to the problem.\(^{224}\) Judicial purists, however, believe that Congress purposely drafted the antitrust laws ambiguously to allow the courts freedom to expand the law as justice requires.\(^{225}\) There is little merit in contesting the role of the court in the resolution of the contribution question. Counsel, litigants, and the business community require an answer to the contribution issue irrespective of the source of such guidance.\(^{226}\)

A distillation of the more conclusive arguments espoused by participants in the contribution debate reveals three compelling findings. First, under a pure no contribution rule (contribution without carve-out), a nonsettling defendant in a multiparty antitrust action is often coerced into negotiating a settlement with plaintiffs when other defendants settle out of the action.\(^{227}\) Secondly, a pure contribution rule undoubtedly would complicate litigation and impose attendant burdens.

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\(^{222}\) See Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,702 (10th Cir.). “There has been no linkage by the Supreme Court or by Congress between [Perma Life and the contribution issue] . . . and the existence of such a linkage is doubtful at best.” Id.


\(^{224}\) See Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,704 (10th Cir.); ABA MAJORITY REPORT, supra note 9, at 9. “Definitive rules of law may take years to evolve. Thus, comprehensive legislation . . . can cut short those years of litigation and attendant uncertainty as to many such rules . . .” Id.

\(^{225}\) See United States v. United States Gypsum Corp., 438 U.S. 422, 434 (1978); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911). In addition, congressional action on the subject may be a long and involved process. Senate bill 1468, introduced in June of 1979, needed six months to achieve the approval of the Senate Judiciary Committee. “Although the bill could be called to the Senate floor for a vote, Senate aides find ultimate passage hard to imagine.” ANTITRUST & TRADE REG. REP. (BNA) A-17, no. 942, Dec. 6, 1979. Furthermore, any type of legislation will not resolve all issues surrounding the contribution question and will require some measure of judicial interpretation. See generally Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1183 (8th Cir. 1979); ABA MINORITY REPORT, supra note 9, at 2.

\(^{226}\) See notes 115-16 supra and accompanying text.

\(^{227}\) See notes 143-47 supra and accompanying text.
on the courts. Finally, a pure contribution rule would undermine the preferred and necessary practice of settlement in antitrust litigation. On balance, therefore, the merits of a pure contribution rule do not appear to outweigh the utility of the current no contribution rule.

Although deficiencies exist in many circumstances under the present no contribution rule, a formula must be fashioned to rectify these inadequacies without disturbing the positive characteristics of the no contribution rule. The formula should be coherently and rapidly incorporated, without regard to procedural variances, into the entire body of the antitrust laws to promote certainty and equitable administration of the antitrust laws.

VI. CARVE-OUT: AN EMERGING SOLUTION TO THE CONTRIBUTION QUESTION IN ANTITRUST LITIGATION

The carve-out technique represents a progressive solution to the contribution morass. Carve-out, a hybrid of the alternatives to contribu-

228. See notes 180-85, 194-96 supra and accompanying text.
229. See notes 153-55 supra and accompanying text.
230. Compare Uniform Contribution Among Tortfeasors Act (1955 & 1977 versions) and ABA Minority Report, supra note 9, at 1 (no contribution imposed against settling defendants) with S. 1468, 96th Cong., 1 Sess. (1979) and ABA Majority Report, supra note 9 (contribution advocated in cases in which defendant has not executed good faith settlement; good faith, settling defendant is immune from contribution and an amount determined with reference to settlement is carved-out of plaintiff's claim).
231. See notes 139-43, 149-51, 227 supra and accompanying text.
233. See notes 115-16 supra and accompanying text.

Many courts in nonantitrust cases have fashioned a carve-out rule. See Leger v. Drilling Well Control, Inc., 592 F.2d 1246, 1249 (5th Cir. 1979); Kassman v. American Univ., 546 F.2d 1029, 1033 n.24 (D.C. Cir. 1976); Brightheart v. McKay, 420 F.2d 242, 243-44 (D.C. Cir. 1969); Gomes v. Brodhurst, 394 F.2d 465, 468 (3d Cir. 1965). See also Luke v. Signal Oil & Gas Co., 523 F.2d 1190, 1191 (5th Cir. 1975) (per curiam) (application of claim reduction rule under Louisiana law

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tion, permits reduction before trebling of a plaintiff's monetary claim against nonsettling defendants after one defendant has executed a settlement pact with plaintiffs. The carve-out rule treats all parties to the litigation equitably. The nonsettling defendant is "credited" each time a fellow defendant enters into a settlement with the plaintiffs. The plaintiff is not affected adversely by the execution of settlement agreements because his potential recovery from nonsettling defendants is reduced commensurate with the amount of damages paid by the settling defendant to the plaintiff. The carve-out rule also retains the defendant's incentive to settle with the plaintiff because settling defendant's exposure to additional liability is terminated on court approval of the settlement pact.

A carve-out rule reduces the inequity imposed on a single, nonsettling defendant, without coercing that defendant into negotiating a settlement because a nonsettling defendant will not assume financial responsibility for the tortious conduct of settling defendants. In some cases, settlements could reduce a plaintiff's pretrial claim to a point where the claim against remaining nonsettling defendants is minimal. The reason for adopting contribution is lost when settling defendants no longer are coerced into premature settlements. The carve-out rule will not complicate antitrust actions or burden the courts. A

in personal injury action on pro-rata basis); Martello v. Hawley, 300 F.2d 721, 724 (D.C. Cir. 1962) (pro-rata).

Proposed congressional legislation, although advocating contribution in price-fixing actions, has incorporated the carve-out rule (on a greater of sales/purchases or settlement method) for a defendant's good faith settlement with plaintiff's class. S. 1468, 96th Cong., 1st Sess. (1979). The ABA Section on Antitrust Law has adopted an analogous approach to S. 1468, except that plaintiff's claim would be carved out by the relative fault of the settling party. ABA MAJORITY REPORT, supra note 9, at 10 (report calls for contribution in all types of antitrust cases).

235. See note 3 supra (under current practice, plaintiff's claim is reduced by defendant's settlement amount after trebling).

236. Antitrust plaintiffs may express displeasure at the adoption of carve-out. Under current practices, plaintiffs often recover both a trebled judgment and any monies procured through settlements. A plaintiff, however, is not entitled to more than one recovery for the same injury. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971).

237. See Brief for Appellees (Menasha Corp. and Stone Container Corp.) at 3, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979).

238. See id. at 13.

239. See Brief for Appellees (Weyerhaeuser Co. and Williamette Industries) at 3, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979). See also notes 143-46 supra and accompanying text.

240. Carve-out would not require use of third party actions, separate actions, or cross-claims to achieve its goals. The assessment of the relative fault of a settling defendant would be the only
carve-out rule, implemented without regard to the type of antitrust violation alleged in plaintiff's complaint, provides all parties to the litigation with certainty of the law. 241

A settlement under carve-out punishes the settling, alleged antitrust wrongdoer, compensates the injured plaintiff, and comports with the purposes of the antitrust laws. 242 A carve-out formula also ameliorates the frequency of collusive practices among litigants because plaintiffs will realize that the settlement agreement will affect the amount of the final judgment. 243 Carve-out insures that a plaintiff can maintain the right to control the action because named defendants will not be able to implead third party defendants or file cross-claims for contribution. 244 Additionally, carve-out retains the deterrent value of the no contribution rule 245 without discouraging private attorneys general from bringing suit to enforce the antitrust laws. 246

Carve-out is not, however, a panacea. The palatibility of carve-out depends on the amount "carved-out," before trebling, of plaintiff's claim for relief. Courts and commentators have posited five different methods of carve-out calculation. 247 First, some courts have advocated carve-out on a pro-rata scale. 248 Although the pro-rata method is easily administered and provides sufficient deterrent value, 249 it may expose a nonsettling defendant to more than his fair share of liability. 250

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Secondly, the Uniform Commission on State Laws in 1955 proposed that plaintiff's claim should be reduced by the amount of defendant's settlement.251 This method may work to the disadvantage of the non-settling defendant by compelling him to accept a judgment in excess of his relative fault252 and by inducing collusion between settling defendants and plaintiffs.253

Thirdly, the American Bar Association Section on Antitrust Law has advocated a relative (comparative) fault model.254 A relative fault rule would necessitate a pretrial hearing on the merits before the court could reduce the settling defendant's share from plaintiff's claim.255 The relative fault rule also may discourage plaintiffs from entering into settlements because the reduction of plaintiff's claim by the degree of settling defendant's fault may be in excess of the settlement amount recovered by plaintiff.256

Fourthly, the Uniform Commission on State Laws in 1977 urged that plaintiff's claim be reduced by the greater of either the settlement amount or the relative fault of the settling defendant.257 Under the "greater of" rule, a plaintiff assumes the risk that the relative fault of the settling defendant might exceed the amount of damages received by plaintiff.258 Further, if plaintiff recovered a "profitable" settlement in excess of the settling defendant's culpability, the judgment would not

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251. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955).
252. See note 250 supra and accompanying text.
254. See ABA MAJORITY REPORT, supra note 9.
255. See ABA MINORITY REPORT, supra note 9, at 7.
256. The settling defendant's market share also may be an appropriate substitute for relative fault, particularly in multiparty, horizontal, price-fixing cases. See Brief for Appellees (Weyerhaeuser Co. and Williamette Industries) at 12, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir. Oct. 30, 1979); Memoranda of Defendants Weyerhaeuser Co. and Westvaco Corp. Concerning the Issue of Contribution at 8, 9, In re Fine Paper Antitrust Litigation, J.P.M.D.L. 323 (E.D. Pa. Aug. 3, 1979); ABA MAJORITY REPORT, supra note 9, at 3. But see S. REP. No. 428, 96th Cong., 1st Sess. 38 (1979) ("No plaintiff in his right mind is going to settle with a defendant with a small net worth and a large market share if by doing so he is going to take thirty or forty or fifty percent of the market out of the case.").
258. See note 256 supra and accompanying text.
award plaintiff the benefit of his bargain. This rule would discourage plaintiffs from settling to an even greater extent than the relative fault method.

Finally, an "average of" carve-out rule would reduce plaintiff's claim by the mean of the settlement amount and the relative fault of the settling defendant. Adoption of the "average of" rule would neither overtly deter plaintiffs from executing settlement agreements nor unfairly penalize the nonsettling defendant. Plaintiffs would hesitate to collude with defendants because the value of plaintiff's claim against nonsettling defendants would depend on the amount of the settlement.

VII. CONCLUSION

The federal antitrust laws should not incorporate a right of contribution among defendants in a private, treble damage antitrust action. The traditional federal common-law rule, which denies a right of contribution among all antitrust defendants, is imperfect yet preferable to a pure contribution rule. Statutory or judicial acceptance of a carve-out formula in antitrust actions may provide a solution to the inadequacies inherent in the no contribution approach without eliminating the numerous positive traits of the traditional rule. The Supreme Court's inevitable statement on the contribution issue should contain an acknowledgement of the validity and vitality of carve-out in private, treble damage antitrust actions.

R. Mark McCareins

259. The average of the settling defendant's market share and the amount of the settlement might be employed as a carve-out measure in a horizontal price-fixing action. See note 256 supra.
260. See note 256 supra and accompanying text.
261. See notes 250, 253 supra and accompanying text.